No. 18-525

IN THE
Supreme Court of the United States

FORT BEND COUNTY,
Petitioner,

v.

LOIS M. DAVIS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, requires plaintiffs to exhaust claims of employment discrimination with the EEOC before filing suit in federal court. *Id.* § 2000e-5(b), (f)(1). The question presented is:

Whether Title VII's administrative exhaustion requirement is a jurisdictional prerequisite to suit, as three Circuits have held, or a waivable claim-processing rule, as eight Circuits have held.

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BRIEF FOR PETITIONER

INTRODUCTION

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, requires aggrieved parties to file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) before proceeding to court. This exhaustion requirement ensures that the EEOC is able to investigate claims of employment discrimination before litigation occurs. It enables the Commission to uncover patterns and practices of discrimination, and to bring enforcement actions of its own. And it advances Congress's "preferred means" of resolving employment disputes:

through "[c]ooperation and voluntary compliance." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015) (internal quotation marks omitted).

The question presented is whether courts may assume jurisdiction over Title VII claims that were never brought before the EEOC. The better view is that they cannot. When Congress establishes "a statutory scheme of administrative and judicial review," it generally intends to "preclude[] *** jurisdiction" over claims that were not pressed through the requisite administrative channels. *Elgin* v. *Dep't of Treasury*, 567 U.S. 1, 8-10, 13 (2012). Title VII's painstakingly detailed administrative-review scheme makes it more than "fairly discernible" that Congress intended the statutorily specified means of obtaining judicial review to be "exclusive." *Id.* at 8-10. And the many system-related goals of the statute's exhaustion requirement—from protecting the EEOC's enforcement role to safeguarding the interests of state and local sovereigns—would be thwarted if the exhaustion requirement could be waived at the discretion of private litigants.

This Court has consistently held that a wide variety of statutory exhaustion requirements are jurisdictional prerequisites to suit. Title VII should not be an exception to that rule. The Fifth Circuit's judgment to the contrary should be reversed.

OPINIONS BELOW

The Fifth Circuit's opinion (Pet. App. 1a-15a) is reported at 893 F.3d 300. The District Court's opinion (Pet. App. 16a-38a) is not reported, and is available at 2016 WL 4479527. The Fifth Circuit's order

denying panel rehearing and rehearing en banc (Pet. App. 39a-40a) is not reported.

JURISDICTION

The Fifth Circuit entered judgment on June 20, 2018. Fort Bend County filed a timely petition for rehearing en banc, which was denied on July 20, 2018. Fort Bend County filed a petition for writ of certiorari on October 18, 2018, and this Court granted the petition on January 11, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the statutory addendum.

STATEMENT

A. Statutory Background

1. Congress enacted Title VII of the Civil Rights Act in 1964 to prohibit employment discrimination on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Congress envisioned a very particular means of eliminating discrimination from the workplace: Charges of discrimination should be resolved, if possible, through "[c]ooperation and voluntary compliance," rather than through the crucible of adversarial litigation. *Mach Mining*, 135 S. Ct. at 1651 (internal quotation marks omitted). To achieve that goal, Congress established an expert agency, the EEOC, with "[p]rimary responsibility" for eradicating discrimination. *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 61-62 (1984); *see* 42 U.S.C. § 2000e-5(a). And Congress required employees to present their claims of discrimination to the EEOC before proceeding to court themselves. *See Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

As initially designed, however, Congress's plan had a "major flaw": Title VII did not give the EEOC independent authority to file charges or bring civil complaints. *Gen. Tel. Co. of the Nw., Inc.* v. *EEOC*, 446 U.S. 318, 325 (1980) (quoting S. Rep. No. 92-415, at 4 (1971)). As a result, the agency's attempts at conciliation were often toothless, and employers "more often than not shrugged off the Commission's entreaties," confident that poorly resourced plaintiffs would be "unlikel[y]" to file suit or defeat them in court. H.R. Rep. No. 92-238, at 9 (1971).

To remedy this problem, in 1972 Congress amended Title VII to strengthen the EEOC's role. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, sec. 4, § 706(f)(1), 86 Stat. 103, 105. It granted the EEOC authority to file charges in its own right, thereby giving the agency the power to initiate investigations without waiting for an individual employee to file a charge. *See Alexander*, 415 U.S. at 44. In addition, Congress gave the EEOC the right of first refusal to file suit once the agency's efforts at conciliation failed, so that the EEOC rather than private plaintiffs would now "bear the primary burden of litigation." *Gen. Tel. Co.*, 446 U.S. at 326. Proponents of this amendment hoped that creating a more credible threat of enforcement "would [better] bring about effective voluntary compliance with the orders of the Commission." 117 Cong. Rec. 31970 (1971) (statement of Rep. Steiger). And they expected that litigation would be "the exception and not the rule," with "the vast majority" of cases resolved outside of court. 118 Cong. Rec. 7168 (1972) (Conf. Rep.).

2. Title VII now establishes "an integrated, multi-step enforcement procedure" that plaintiffs must undergo before filing suit. *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 359 (1977).

That process often begins at the state or local level. If an alleged act of discrimination takes place in a State or locality that has its own process for addressing employment discrimination, an employee must initiate those state or local proceedings first, and she must give the state or local authority time to address the issue. 42 U.S.C. § 2000e-5(c).

The federal administrative process then begins with the filing of a "charge" of discrimination with the EEOC. *Id.* § 2000e-5(b). A charge "is a signed statement asserting that an employer, union or labor organization engaged in employment discrimination." *Filing A Charge of Discrimination*, U.S. Equal Emp't Opportunity Comm'n.[1] Each charge must be "under oath or affirmation" and must "includ[e] the date, place and circumstances of the alleged unlawful employment practice." 42 U.S.C. § 2000e-5(b). In addition, the charge must be "sufficiently precise * * * to describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b). A charge can be filed by "a person claiming to be aggrieved" or by the EEOC itself. 42 U.S.C. § 2000e-5(b).

Once a charge is filed, the EEOC is required to "serve a notice of the charge" on the employer and "make an investigation" of the allegations asserted in the charge. *Id.* During that investigation, the EEOC

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[1] *Available at* https://www.eeoc.gov/employees/charge.cfm (last visited Feb. 25, 2019).

is entitled to "have access to * * * any evidence of any person being investigated" that relates to the alleged discrimination. *Id.* § 2000e-8(a). It is also required to "accord substantial weight" to findings made by the "State or local authorities" during their own proceedings. *Id.* § 2000e-5(b).

If the EEOC determines "that there is not reasonable cause to believe that the charge is true," it must dismiss the charge. *Id.* If, however, the EEOC finds that reasonable cause for the charge exists, it must "endeavor to eliminate" the discriminatory employment practice "by informal methods of conference, conciliation, and persuasion." *Id.* The duty to attempt informal resolution of the complaint is "not precatory"; it is "a key component of the statutory scheme," which "serves as a necessary precondition to filing a lawsuit." *Mach Mining*, 135 S. Ct. at 1651.

If the EEOC fails to resolve a complaint through conciliation, the Federal Government may then proceed to court. Where the "respondent * * * named in the charge" is a private employer, the EEOC is empowered to bring a civil action. 42 U.S.C. § 2000e-5(f)(1). Alternatively, where the respondent is a government entity, the EEOC may refer the case to the Attorney General, who in turn may sue. *Id.* If either the EEOC or the Attorney General chooses to sue, the employee who filed the charge has "the right to intervene" in the action. *Id.*

An aggrieved employee may file suit herself only if, at the end of this process, the government declines to act—that is, only if a charge is dismissed by the EEOC, the EEOC fails to take action within a specified timeframe, or the EEOC or the Attorney General chooses not to sue and notifies the employee through

a "Right to Sue" letter. *Id.*; *see Filing a Lawsuit*, U.S. Equal Emp't Opportunity Comm'n.[2] At that point, "a civil action may be brought" by the aggrieved employee "against the respondent named in the charge." 42 U.S.C. § 2000e-5(f)(1). Federal courts are granted "jurisdiction of actions brought under" Title VII. *Id.* § 2000e-5(f)(3).

B. Factual And Procedural Background

1. Lois Davis worked as an information technology supervisor for Fort Bend County from 2007 to 2011. Pet. App. 17a n.2. In 2010, Davis informed the County's human resources department that the County's director of information technology had been sexually harassing her. *Id.* The County immediately placed Davis on paid leave and conducted an investigation that led to the IT director's resignation three weeks later. *Id.*; *see* J.A. 59.

In February 2011, Davis completed an "intake questionnaire" for the Texas Workforce Commission (TWC). J.A. 69. On that form, Davis specified that she wished to present allegations of "sexual harassment" and "retaliation." J.A. 73-74. Davis did not indicate in any way that she wished to complain of religious discrimination. *See id.* The TWC sent a letter to Davis, through her attorney, acknowledging her "intake questionnaire" and enclosing TWC charge forms. J.A. 102-104.

The next month, Davis filed a charge of discrimination with the TWC and the EEOC using the TWC

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[2] *Available at* https://www.eeoc.gov/employees/lawsuit.cfm (last visited Feb. 25, 2019).

charge form. J.A. 69.[3] On the charge, as on Davis's intake questionnaire, boxes were checked indicating that Davis wished to press claims based on "sex" and "retaliation," while the box next to "religion" was left blank. J.A. 80. The narrative section of the charge described the details of the alleged sexual harassment and retaliation against Davis, without any mention of religious discrimination. *Id.* And in the charge's "Discrimination Statement," Davis asserted only that "I believe I have been discriminated against * * * because of my gender/sex, female, and in retaliation for my complaint of harassment." *Id.* Davis signed this form under oath in the presence of a notary. *Id.*

While Davis's EEOC charge was pending, the County completed preparations to relocate its courthouse-related offices to its newly built County Justice Center. Pet. App. 18a n.2. The final relocation was scheduled for the long weekend of July 4, 2011, and the County told all technical support employees, including Davis, that they needed to be present to set up the County's computer system. *Id.* After repeated warnings that failure to attend would result in disciplinary action, Davis did not appear for the

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[3] The TWC and the EEOC have a Worksharing Agreement. *See* 29 C.F.R. § 1626.10 (authorizing EEOC to enter into worksharing agreements); 40 Tex. Admin. Code § 819.76 (providing that the TWC "shall enter into workshare agreements with EEOC"). Under this agreement, all complaints made with the TWC are automatically submitted to the EEOC. *See How to Submit an Employment Discrimination Complaint*, Tex. Workforce Comm'n, *available at* https://tinyurl.com/y2maaql6 (last updated Jan. 17, 2019).

scheduled move, and the County terminated her employment. *Id.*; *see* J.A. 85-86.

Davis recalls sending a modified "intake questionnaire" to the TWC and the EEOC sometime in the "late summer or fall of 2011." J.A. 71. Davis edited the questionnaire by handwriting the word "religion" next to a checklist labeled "Employment Harms or Actions." J.A. 90. Davis did not check the box for religious discrimination located on the first page of the intake questionnaire. *See* J.A. 89. She did not explain the meaning of the handwritten word "religion," and she did not describe the events surrounding her termination. The modified "intake questionnaire" does not reflect any edits indicating the date the alterations were made, and it is not signed under oath. J.A. 89-90. The actual EEOC charge was not altered in any way. *See* J.A. 99.

In November 2011, the TWC informed Davis, through her attorney, that the TWC had made a preliminary decision to dismiss her charge. J.A. 92-95. The TWC explained that "it cannot be established that the employer has discriminated against you based on Sex, Retaliation, or any other reason prohibited by the laws we enforce." J.A. 92. At the request of Davis's attorney, the TWC and the U.S. Department of Justice subsequently sent Davis letters informing her that she had a right to sue under Title VII. J.A. 97-98, 108-109.

2. In 2012, Davis sued Fort Bend County in the Southern District of Texas. In addition to claiming that County employees violated Title VII by allegedly retaliating against her for complaining of sexual harassment, J.A. 25, she claimed for the first time

that the County engaged in religious discrimination by requiring her to work on a Sunday, J.A. 22-24.

The District Court initially granted the County's motion for summary judgment on all counts. *Davis* v. *Fort Bend Cty.*, No. 4:12-CV-131, 2013 WL 5157191, at *7 (S.D. Tex. Sept. 11, 2013). The Fifth Circuit reversed in part, however, finding a "genuine dispute of material fact" as to whether the County had a sufficiently compelling reason for requiring Davis to work on a Sunday. *Davis* v. *Fort Bend Cty.*, 765 F.3d 480, 489 (5th Cir. 2014).

On remand, Davis amended her complaint to substantially expand her claim of religious discrimination. J.A. 44-49. The County moved to dismiss the claim, arguing that the district court lacked subject matter jurisdiction to consider this claim because Davis did not raise it in her EEOC charge. Pet. App. 21a-22a.

The District Court granted the motion to dismiss. *Id.* at 16a. It explained that Title VII's "exhaustion requirement is jurisdictional," and that Davis "failed to exhaust her administrative remedies regarding her religious discrimination claim." *Id.* at 37a. It noted that Davis "d[id] not mention religious discrimination" in her EEOC charge. *Id.* at 29a. Furthermore, it found that she did not sufficiently raise that claim before the EEOC by belatedly writing the single word "religion" on her intake questionnaire. Among other problems, "'an intake questionnaire does not constitute a charge'"; the amendment "was not under oath"; and there is "no evidence that Defendant was aware of [the] amendment." *Id.* at 29a-32a. Moreover, Davis "did not include any additional information or expla[nation]" alongside

the solitary word "religion," and—in light of the inadequacy of this amendment—the EEOC was not aware of and did not investigate any potential religious discrimination. *Id.* at 32a-34a. The District Court thus found it lacked jurisdiction to consider the religious discrimination claim. *Id.* at 37a.

The Fifth Circuit reversed. *Id.* at 1a.[4] After reviewing its own case law and the language of Title VII, the Fifth Circuit concluded that the statute's administrative exhaustion requirement is not jurisdictional. *Id.* at 12a. It also found that the County forfeited its exhaustion defense by failing to raise it earlier in the litigation. *Id.* at 15a.

This Court granted certiorari.

SUMMARY OF ARGUMENT

I. The Constitution grants Congress the power to define the contours of the federal courts' jurisdiction. Congress often exercises that power by allocating jurisdiction over a particular claim first to an expert agency and then to the federal courts. This Court has repeatedly held that when Congress creates such "a statutory scheme of administrative and judicial review," the scheme "preclude[s] district court jurisdiction" over claims that have not been presented to the agency if it is "fairly discernible" that Congress intended to limit jurisdiction. *Elgin*, 567 U.S. at 8-10 (quoting *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1994)). In discerning Congress's intent, the Court looks to the "text, structure, and purpose" of the statute. *Id.* at 10. Where the text and structure set out an intricate statutory scheme, and where the

[4] Judge Jones concurred in the judgment only.

statute's core purposes would be frustrated by the absence of agency review, it is "fairly discernible" that Congress intended to make exhaustion a jurisdictional prerequisite to suit.

The text, structure, and purposes of Title VII make it "fairly discernible" that Congress intended to bar jurisdiction over claims that have not been presented to the EEOC. Title VII "sets out a detailed, multi-step procedure through which the [EEOC] enforces the statute's prohibition on employment discrimination." *Mach Mining*, 135 S. Ct. at 1649. The statutorily specified process is at least as "elaborate" and "comprehensive" as those deemed jurisdictional in the past. *Elgin*, 567 U.S. at 10-12 (internal quotation marks omitted). And Title VII's scheme brooks no exceptions; *every* individual must present her claims of employment discrimination to the EEOC in the first instance.

Moreover, the purposes of Title VII would be "seriously undermined" if the statute's exhaustion requirement was not jurisdictional. *Id.* at 14. In Title VII, Congress sought to remedy employment discrimination primarily through "[c]ooperation and voluntary compliance." *Mach Mining*, 135 S. Ct. at 1651 (internal quotation marks omitted). It also sought to give the EEOC the primary role in vindicating the public's interest in eradicating workplace discrimination. And it aimed to respect the principles of federalism by ensuring that state and local administrative bodies may play a part in the resolution of discrimination claims.

Each of these congressional purposes would be undermined if courts could assume jurisdiction over claims never presented to the EEOC. A claim cannot

be "administratively resolved" if a court begins adjudicating that claim before it has been submitted to the agency. Similarly, the EEOC cannot fulfill its central role in combatting employment discrimination and detecting patterns and practices of misconduct if courts may resolve discrimination claims that the EEOC knows nothing about. And allowing courts to exercise jurisdiction in the first instance would mean leapfrogging not only the EEOC, but also the state and local administrative proceedings that must be initiated before EEOC review.

This Court's decision in *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), is fully consistent with the proposition that Title VII's exhaustion requirement is jurisdictional. *Zipes* held that Title VII's statutory deadline for seeking administrative review is non-jurisdictional. *Id.* at 398. It did not address the statute's exhaustion requirements, and its reasoning was specific to the text, legislative history, and precedent governing the timing requirement. Furthermore, statutes often contain a non-jurisdictional timeliness provision and a jurisdictional exhaustion requirement, in light of the fact that the two types of requirements have very different common law backdrops, purposes, and equitable implications. That Title VII permits equitable tolling of its timing requirement does not suggest that courts may assume jurisdiction over claims that have not been presented to the EEOC at all.

II. Outside of the exhaustion context, this Court has often applied a "clear statement" analysis to decide whether a statutory requirement is jurisdictional. That analysis does not apply here: This Court has repeatedly said that it need only be "fairly

discernible" that Congress intended to strip jurisdiction of claims that have not been presented to an administrative body. In any event, Title VII contains a "clear statement" that its exhaustion requirement is jurisdictional.

Title VII's "text" and "structur[e]" make plain that exhaustion is a jurisdictional prerequisite to suit. *United States* v. *Kwai Fun Wong*, 135 S. Ct. 1625, 1632-33 (2015). The statute's intricate scheme sets forth the exclusive way that Congress wished federal courts to assume jurisdiction. The exhaustion requirement is housed in the section of the statute captioned "jurisdiction," and it is tightly linked to the statute's explicit jurisdictional grant. And there is no exception to the requirement that every discrimination claim must first be presented to the agency in the form of a "charge."

Title VII's exhaustion requirement is also designed to advance "broader system-related goal[s]"—a hallmark of a jurisdictional rule. *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133 (2008). The exhaustion requirement "facilitat[es] the administration of" discrimination claims, "limit[s] the scope of [the] governmental waiver of sovereign immunity" for state and federal employers, and "promot[es] judicial efficiency" by reducing the number of Title VII claims that end up in court. *Id.*

Finally, the "context" provided by this Court's prior interpretation of Title VII's exhaustion requirement and similar requirements in other statutes confirms that exhaustion is a jurisdictional prerequisite. *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154 (2013). This Court has long described Title VII's exhaustion requirement as jurisdictional; although

the Court has sometimes deemed other Title VII requirements non-jurisdictional, it has not disturbed that basic holding. Further, in case after case, the Court has held that statutory exhaustion requirements are jurisdictional, even when the text is silent on that issue.

III. Because Title VII's exhaustion requirement is jurisdictional, the district court correctly dismissed Davis's religious discrimination claim. Davis did not present that claim to the EEOC in her charge, and the expert agency gave no indication that it investigated her religious discrimination claim or even was aware of it. Permitting the courts to assume jurisdiction in this circumstance would undermine Congress's carefully constructed scheme of administrative and judicial review. The judgment of the Fifth Circuit should be reversed.

ARGUMENT

I. TITLE VII'S INTEGRATED SCHEME OF ADMINISTRATIVE AND JUDICIAL REVIEW IS THE EXCLUSIVE MEANS THROUGH WHICH COURTS MAY OBTAIN JURISDICTION OVER A CLAIM.

Article III of the Constitution sets the basic contours of judicial authority in our tripartite system, but the Constitution gives Congress the power to further define those contours by deciding what cases and controversies will come within the jurisdiction of the federal courts. Congress's authority over federal jurisdiction is "an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain

subjects." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 101 (1998).

In the last century, as the administrative state has grown, Congress has frequently exercised its constitutional authority in this realm to allocate jurisdiction between Article III courts and administrative bodies. In performing that task, Congress has sometimes elected to deprive Article III courts of jurisdiction altogether, committing the resolution of certain issues exclusively to an administrative agency. *See, e.g.*, *Switchmen's Union of N. Am.* v. *Nat'l Mediation Bd.*, 320 U.S. 297, 301-302 (1943) (holding that courts lack jurisdiction to review certain claims under the Railway Labor Act because Congress entrusted review exclusively to an administrative board). More often, Congress has adopted a nuanced approach, vesting authority in an agency in the first instance, and then shifting jurisdiction to the federal courts. *See, e.g.*, *Elgin*, 567 U.S. at 9; *Thunder Basin*, 510 U.S. 200.

Title VII establishes just such a jurisdiction-shifting scheme for the resolution of claims of employment discrimination: It requires that a "charge" of employment discrimination first be "filed" with the EEOC. 42 U.S.C. § 2000e-5(b). The statute then "grant[s] the EEOC exclusive jurisdiction over the claim for 180 days." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 288 (2002); 42 U.S.C. § 2000e-5(f)(1). During that period, the EEOC must notify the employer and investigate the charge. 42 U.S.C. § 2000e-5(b). "If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate" the alleged practice "by

informal methods of conference, conciliation, and persuasion." *Id.*

Once the EEOC has had the opportunity to resolve the charge through these "informal methods," jurisdiction shifts to the courts, either in the form of a suit brought by the Government or in a private action: If the EEOC believes a charge is true but is unable to resolve the charge itself, it "may bring a civil action against" a non-governmental respondent, or it may "refer the case to the Attorney General" to "bring a civil action against" a governmental defendant. *Id.* 2000(e)-5(f)(1). Alternatively, if the EEOC dismisses a charge or otherwise fails to resolve the claim or bring suit within 180 days, "a civil action may be brought against the respondent named in the charge * * * by the person claiming to be aggrieved." *Id.* "Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under" these provisions. *Id.* 2000(e)-5(f)(3).

This statutory scheme leaves no room to doubt that federal courts have jurisdiction over Title VII claims that have been brought through the statutorily mandated administrative process. The question in this case is whether a court may also exercise authority over a charge that has never been presented to the EEOC. The answer is no: When Congress creates "a statutory scheme of administrative and judicial review," that scheme "preclude[s] district court jurisdiction" over claims that have not been presented to the agency in the first instance so long as the "text, structure, and purpose" of the statute make it "fairly discernible" that Congress intended to

limit jurisdiction. *Elgin*, 567 U.S. at 8-10 (internal quotation marks omitted). The text, structure, and purpose of Title VII make it abundantly clear that Congress intended to grant courts jurisdiction exclusively over claims that have been presented to the EEOC in the first instance.

A. A Statutory Scheme Of Administrative And Judicial Review Typically Strips Courts Of Jurisdiction Over Claims That Have Not Been Presented To The Agency.

"Generally, when Congress creates procedures 'designed to permit agency expertise to be brought to bear on particular problems,' those procedures 'are to be exclusive.'" *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010) (quoting *Whitney Nat'l Bank in Jefferson Parish* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965)). Accordingly, when faced with claims that have not been presented through a statutorily mandated administrative scheme, this Court has held that jurisdiction is lacking so long as "the 'statutory scheme' displays a 'fairly discernible' intent to limit jurisdiction." *Id.* at 489 (quoting *Thunder Basin*, 510 U.S. at 207).

Thus, in *Thunder Basin*, the Court held that "the Mine Act's comprehensive enforcement and administrative review scheme precluded district court jurisdiction over petitioner's claims" because those claims had not been pressed through the administrative scheme. 510 U.S. at 206, 216. The Mine Act, the Court explained, "establishes a detailed structure" for administrative review of alleged violations of health and safety standards, and "[n]othing in the language and structure of the Act or its legislative

history suggests that Congress intended to allow [petitioner] to evade the statutory-review process." *Id* at 207, 216. "To uphold the District Court's jurisdiction" over claims that were never presented to the administrative agency, the Court concluded, "would be inimical to the structure and the purposes of the * * * Act." *Id.* at 216.

Similarly, in *Free Enterprise Fund*, this Court considered "whether the District Court had jurisdiction" to consider a claim that was brought outside of the Sarbanes-Oxley Act's scheme for administrative and judicial review. 561 U.S. at 489. The Court reaffirmed that "[g]enerally" such statutory schemes "limit jurisdiction" with respect to covered claims, particularly where the claims implicate the "competence and expertise" of the agency charged with initial review. *Id.* at 489, 491. The Court held that the *Free Enterprise Fund* petitioners could skip that review scheme only because the claim in question—a facial constitutional challenge to the agency's for-cause removal structure—was "wholly collateral to [the] statute's review provisions" and "outside the agency's expertise." *Id.* at 489-490 (internal quotation marks omitted).

Two years later, in *Elgin*, the Court reaffirmed that "a statutory scheme of administrative and judicial review" strips a court of jurisdiction over claims that have not been presented to the agency so long as "it is 'fairly discernible' that Congress precluded district court jurisdiction over [such] claims." 567 U.S. at 8-10. The Court held that the "'elaborate' framework" of the Civil Service Reform Act (CSRA) and the statute's "objective of creating an integrated scheme of review" demonstrated "Congress' intent to entirely

foreclose judicial review" over claims by federal employees challenging adverse employment actions unless the claims were first presented to an expert agency. *Id.* at 10-11, 14. Moreover, the *Elgin* Court emphasized the strength of this "jurisdictional rule": Even where the agency lacks the authority to resolve an employee's constitutional claims, the Court held, the employee is nonetheless required to present the claims to the agency as a prerequisite to any judicial review. *Id.* at 15.

Together, *Thunder Basin*, *Free Enterprise Fund*, and *Elgin* articulate a straightforward rule: Where Congress establishes "a statutory scheme of administrative and judicial review," district courts lack jurisdiction over any claim that has not been presented to the agency so long as it is "fairly discernible" that Congress intended to "limit jurisdiction" in this way. And it is generally "fairly discernible" that Congress intended to limit jurisdiction where the statutory scheme is "integrated" and "comprehensive," where it vests authority in a federal agency with "competence and expertise" over the claims at issue, and where deeming the requirement non-jurisdictional "would be inimical to * * * the purposes of the * * * Act."

Moreover, even in cases where the Court has not explicitly invoked this rule, it has held that Congress erects a jurisdictional limit on the authority of the courts when it mandates that an issue be presented to an expert agency in the first instance. For example, in *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645 (1982), the Court held that a provision in the National Labor Relations Act (NLRA) barring consideration of an objection "that has not been

urged before the [National Labor Relations] Board" dictates that courts "lack[] jurisdiction to review objections" that have not been presented to the Board. *Id.* at 665-666 (internal quotation marks omitted); *see Sims* v. *Apfel*, 530 U.S. 103, 108 (2000) (reiterating that courts "lack[] jurisdiction to review objections not raised before the National Labor Relations Board"). More broadly, this Court has held that plaintiffs may not "invoke federal jurisdiction" over certain NLRA claims that have not been presented to the NLRB in the "first instance" because Congress has given "primary jurisdiction" to the National Labor Relations Board. *Marquez* v. *Screen Actors Guild, Inc.*, 525 U.S. 33, 49-50 (1998); *see also San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245-246 (1959).

Likewise, the Court has held that a provision in the Social Security Act that authorizes a plaintiff to file "a civil action" only "after [a] final decision of the Commissioner," 42 U.S.C. § 405(g), creates a "nonwaivable jurisdictional requirement that a claim for [Social Security] benefits shall have been presented to the Secretary." *Heckler* v. *Day*, 467 U.S. 104, 110 n.14 (1984); *see Weinberger* v. *Salfi*, 422 U.S. 749, 764 (1975) (same); *Mathews* v. *Eldridge*, 424 U.S. 319, 328 (1976) (same). And in *McNeil* v. *United States*, 508 U.S. 106 (1993), the Court upheld the lower court's jurisdictional dismissal of a suit that failed to comply with a statutory exhaustion provision in the Federal Tort Claims Act. *See id.* at 111 (suggesting that compliance with this requirement is a "necessary predicate[] to the invocation of the court's jurisdiction"). Other precedents stretching back decades are to the same effect. *See Fed. Power Comm'n* v. *Colorado Interstate Gas Co.*, 348

U.S. 492, 498-499 (1955); *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540, 544-545 (1946).

The administrative review schemes deemed jurisdictional in these cases come in many different forms. Some, like the CSRA scheme at stake in *Elgin*, mandate "proper exhaustion": They require a litigant to present her claim through several levels of adversarial administrative processes until she receives a final decision from the agency. *Woodford* v. *Ngo*, 548 U.S. 81, 90 (2006). Others, like the FTCA requirement at stake in *McNeil*, simply require a litigant to present her claim to an administrative body; they permit suit after a certain period of time even if the agency has not "ma[d]e final disposition of [the] claim." 28 U.S.C. § 2675(a).[6] Further, whereas some of these provisions channel jurisdiction exclusively into a single court, *see Elgin*, 567 U.S. at 6 (CSRA), others permit jurisdiction in any appropriate district court, *e.g.*, *Salfi*, 422 U.S. at 763 (Social Security Act), or court of appeals, *e.g.*, *Thunder Basin*, 510 U.S. at 204 (Mine Act).

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[6] As the *Woodford* Court observed, Title VII's so-called exhaustion provision properly falls in this bucket because it does not require a litigant to obtain a final administrative decision. 548 U.S. at 99. Instead, it requires the litigant to present her claim to the EEOC, and it mandates that she give the agency 180 days to attempt to resolve the claim informally before a civil action may be "brought" against the respondent. 42 U.S.C. § 2000e-5(f)(1). But despite the fact that the relevant Title VII provision does not demand "proper exhaustion," *Woodford*, 548 U.S. at 90, it is commonly referred to as an exhaustion requirement. Accordingly, Fort Bend County adopts that terminology throughout.

But all of these review schemes follow the same basic rule: They appear in a statute that mandates administrative and then judicial review; and the text, structure, and purpose of the statutory scheme make it "fairly discernible" that Congress intended to limit courts' jurisdiction to claims that have been presented to an expert agency in the first instance.

B. Title VII Sets Out An Intricate Scheme Of Administrative And Judicial Review That Bars Jurisdiction Over Claims That Have Not Been Pressed Before The EEOC.

Applying this framework to Title VII leads to the inevitable conclusion that the statute bars jurisdiction over an employment discrimination claim that has not been presented to the EEOC. *Elgin*, 567 U.S. at 15. The statute creates an integrated "scheme of administrative and judicial review," in which a charge of employment discrimination is first filed with the EEOC, and later brought to the courts if the EEOC is unable to satisfactorily resolve the charge on its own. *Id.* at 8. And the "text, structure and purpose" of Title VII make it "fairly discernible" that Congress intended to deprive courts of jurisdiction over claims that have not been presented to the agency through this scheme. *Id.* at 10 (internal quotation marks omitted).

1. As to the "text and structure," this Court's precedents teach that where a statute sets out a "detailed" administrative process culminating in judicial review, the intricacy of the scheme provides strong evidence of a congressional intent to limit jurisdiction. *Thunder Basin*, 510 U.S. at 207. For example, the *Elgin* Court held that "[g]iven the painstaking detail with which the CSRA sets out the method for

covered employees to obtain review of adverse employment actions, it is fairly discernible that Congress intended" to impose a jurisdictional bar on claims brought directly to the district courts. 567 U.S. at 11-12; *see also Thunder Basin*, 510 U.S. at 207-209 (statute's "detailed structure" and "comprehensive review process" indicate intent to preclude review); *Whitney Nat'l Bank*, 379 U.S. at 420 ("carefully planned and comprehensive" scheme shows that courts may review claims "solely as provided in the statute").

The same "painstaking detail" is on display in Title VII. The statute "sets out a detailed, multi-step procedure through which the Commission enforces the statute's prohibition on employment discrimination." *Mach Mining*, 135 S. Ct. at 1649; *see Occidental Life*, 432 U.S. at 359 (Title VII establishes "an integrated, multistep enforcement procedure"). Indeed, Congress devoted paragraphs and paragraphs of dense statutory text to describing the exact process that should occur when an employee raises a claim of employment discrimination.

To take just a small sampling of the intricate commands the statute contains: Before a claim is even presented to the EEOC, "proceedings" must be "commenced" before any state or local authority that might be able to provide relief. 42 U.S.C. § 2000e-5(c). When the claim is brought to the EEOC, it must be in the form of a "charge" that is "in writing under oath or affirmation," and the charge must "contain such information and be in such form as the Commission requires." *Id.* § 2000e-5(b). The EEOC must "serve a notice of the charge (including the date, place and circumstances of the alleged unlawful

employment practice)" on the employer "within ten days." *Id.* The Commission must also make "an investigation," during which it must have access to statutorily specified evidence. *Id.*; *see id.* §§ 2000e-8, 2000e-9 (prescribing details of Commission's investigatory powers and the evidence to which it is entitled). Over the course of the investigation, the agency is permitted to wield "all of the powers conferred upon the National Labor Relations Board by 29 U.S.C. § 161, including the authority to issue subpoenas and to request judicial enforcement of those subpoenas." *Shell Oil Co.*, 466 U.S. at 63 (citing 42 U.S.C. § 2000e-9).

After the EEOC's investigation is concluded, it must decide whether there is "reasonable cause to believe that the charge is true." 42 U.S.C. § 2000e-5(b). If the EEOC determines that reasonable cause exists, it must engage in "conference, conciliation and persuasion" in an attempt to obtain a private, "informal" resolution of the charge. *Id.* A judicial action may be filed by the Commission only if it has been "unable to secure from the respondent a conciliation agreement acceptable to the Commission." *Id.* § 2000e-5(f)(1). If a respondent believes the Commission has not made a good faith effort to obtain conciliation, it may press that as a defense to an EEOC suit. *Mach Mining*, 135 S. Ct. at 1651. Finally, a judicial action may be filed by the "person aggrieved" if the EEOC fails to resolve the charge through conciliation or litigation within 180 days or if the Commission dismisses the charge altogether. 42 U.S.C. § 2000e-5(f)(1).

As was true in *Thunder Basin* and *Elgin*, Congress's decision to laboriously spell out the precise

administrative process that precedes judicial review demonstrates that Congress intended to "preclude * * * jurisdiction" over Title VII claims that have not been presented to the EEOC. *Elgin*, 567 U.S. at 9-10. Congress would hardly have set out a detailed administrative scheme through which a litigant may obtain judicial review if it intended for courts to assume jurisdiction over claims that have not been presented to the agency *at all*.

Moreover, Title VII's review scheme is not only elaborate; it is "comprehensive." *Id.* at 10 (quoting *United States* v. *Fausto*, 484 U.S. 439, 448 (1988)). *Every* category of employee—private, local, state, and federal—must present *every* claim of an unlawful employment practice through the statute's finely wrought administrative review process. *See* 42 U.S.C. § 2000e-5(b), (f)(1); *id.* § 2000e-16; *Nat'l R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 113 (2002) (employee must file a timely charge regarding each "discrete discriminatory act"). Congress did not include any exceptions permitting employees to skip the administrative process and go straight to federal court.[6] "That Congress declined to include an exemption" from its comprehensive review scheme "indicates that Congress intended no such exception." *Elgin*, 567 U.S. at 13.

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[6] 42 U.S.C. § 2000e-6 permits the Commission itself to bring "pattern or practice" claims against an employer, and grants jurisdiction over such claims in a three judge panel if the employer so chooses. But that is hardly an exception to the rule that all Title VII claims must first pass through the agency since it is the agency itself that must bring the pattern or practice complaint.

What is more, the resolution of Title VII claims falls "squarely within the [Commission's] expertise." *Free Enter. Fund*, 561 U.S. at 491 (quoting *Thunder Basin*, 510 U.S. at 214-215). As the *Free Enterprise Fund* Court observed, the inference that Congress intended to strip courts of jurisdiction is at its zenith where the claims in question are within an agency's "competence and expertise." *Id.* By channeling claims to the EEOC, Title VII requires claimants to bring employment discrimination charges before the agency whose entire *raison d'etre* is the eradication of workplace discrimination.

2. The congressional purposes embodied in the Title VII scheme further confirm that presenting a claim to the agency is a jurisdictional prerequisite to judicial review. In *Elgin*, this Court found "support" for the proposition that the CSRA creates a jurisdictional rule in the fact that the statute's "purpose"—namely, "creating an integrated scheme of review" and avoiding "simultaneous proceedings" and "inconsistent decisionmaking"—"would be seriously undermined if * * * a covered employee could challenge a covered employment action first in a district court." 567 U.S. at 13-14; *see also Thunder Basin*, 510 U.S. at 216 (finding a "'fairly discernible' intent to preclude district court review" based in part on Congress's "clear concern with channeling and streamlining the enforcement process"). By the same token, permitting courts to exercise jurisdiction over Title VII claims that have not been presented to the EEOC would "seriously undermine[]" at least three of the major purposes of the statute: (1) encouraging the resolution of discrimination claims out of court; (2) enabling the EEOC to root out employment discrimination; and (3) respecting federalism.

First, allowing employees to circumvent the administrative process would undermine Congress's objective of encouraging non-judicial resolution of employment discrimination claims. When it enacted Title VII, Congress "selected cooperation and voluntary compliance *** as the preferred means for achieving the goal of equality of employment opportunities." *Occidental Life*, 432 U.S. at 367-368 (internal quotation marks and alteration omitted); *see also Mach Mining*, 135 S. Ct. at 1651 ("In pursuing the goal of bringing employment discrimination to an end, Congress chose cooperation and voluntary compliance as its preferred means." (internal quotation marks and alterations omitted)). Title VII therefore codifies a "federal policy" in favor of ensuring that "whenever possible," claims are "administratively resolved before suit is brought in a federal court." *Occidental Life*, 432 U.S. at 368.

Permitting a district court to exercise jurisdiction over a claim that has never been presented to the EEOC would thwart this federal policy. There is no chance that a claim will be "administratively resolved before suit is brought in a federal court," *id.*, if the EEOC is not even made aware of a charge before it is included in a judicial complaint. Just as in *Elgin* and *Thunder Basin*, Congress's aim of "streamlining the enforcement process" and enabling the resolution of employment-discrimination claims out of court is inconsistent with construing the statute to vest jurisdiction in courts before the administrative process has even begun. *Thunder Basin*, 510 U.S. at 216.

Second, allowing courts to adjudicate claims that have not been presented to the EEOC would under-

mine the statutory role of the EEOC itself. This Court has often observed that "the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties." *Occidental Life*, 432 U.S. at 368; *see Gen. Tel. Co.*, 446 U.S. at 325-326. Rather, Congress specifically amended the statute in 1972 to empower the EEOC "to bring its own enforcement actions" and to give the EEOC the right of first refusal to sue on any private claims of employment discrimination. *Waffle House*, 534 U.S. at 286; *see* 42 U.S.C. § 2000e-5(f)(1). This important revision to the statute ensured that the agency could not only "bring about more effective enforcement of private rights," but also "vindicate the *public* interest in preventing employment discrimination"—for instance, by suing to halt a "pattern or practice" of discrimination it uncovers in the course of its investigation of the specific charge an employee raises. *Gen. Tel. Co.*, 446 U.S. at 326-327 (emphasis added).

Indeed, the EEOC's independent role is so important that, in *Waffle House*, this Court held that Title VII precludes parties from entering into a private arbitration agreement that prevents the EEOC from engaging in litigation against the defendant. The Court explained that such an agreement "would undermine the detailed enforcement scheme created by Congress" by prohibiting the EEOC from fulfilling its statutory role in "vindicat[ing] the public interest." 534 U.S. at 296 & n.11.

It is equally clear that the EEOC's role in eradicating workplace discrimination would be "undermine[d]" if courts could assume jurisdiction over claims that have not been presented to the agency. That would deprive the EEOC of its "primary role" in

litigating Title VII claims, and it would strip the agency of its right of first refusal to bring suit before an individual claimant. Moreover, it would impede the EEOC's ability to bring pattern-or-practice claims against employers that have repeatedly violated the Act's anti-discrimination provisions. For example, if a court assumes jurisdiction over a claim of gender discrimination that has not been presented to the EEOC, it will be more difficult for the agency to recognize the "pattern or practice" of gender discrimination when another woman files an EEOC gender discrimination charge against the same employer. And that difficulty is only enhanced by the prevalence of private settlements used to end litigation of this kind.

What is more, only a "jurisdictional rule" will ensure that the EEOC's interests are vindicated. The EEOC itself is rarely a party to suits brought by individual employees, and so it cannot raise a failure-to-exhaust defense. Title VII defendants are unlikely to raise the issue themselves because an employer typically has little incentive to ensure that a plaintiff's claims have been presented to the EEOC. Indeed, an employer that is litigating against a poorly resourced plaintiff, or that is engaged in a pattern or practice of discrimination, will most likely prefer that the claims against it are never brought to the attention of the Commission, which may subject it to harsher scrutiny. *See Kremer* v. *Chem. Constr. Corp.*, 456 U.S. 461, 474 & n.15 (1982) (noting that when Title VII was enacted, some feared "overzealous enforcement by the EEOC"). Expecting the defendant to protect the EEOC's role by raising a failure-to-exhaust defense is therefore akin to trusting the fox to guard the hens. Only by requiring

courts to review and enforce the statute's exhaustion requirement can the Court ensure that the EEOC's statutory prerogatives are protected.

Third, permitting courts to exercise jurisdiction over claims that have not been presented to the EEOC would undercut Congress's intention to respect principles of federalism within the Title VII scheme. In enacting the statute, "[m]embers of Congress agreed that the States should play an important role." *Kremer*, 456 U.S. at 472. Congress believed that "remedying employment discrimination would be an area in which '[t]he Federal Government and the State governments could cooperate effectively.'" *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 63-64 (1980) (quoting 110 Cong. Rec. 7205 (1964) (statement of Sen. Clark)). To that end, Title VII provides that when a State or local authority has established its own remedy for employment discrimination, no charge may be reviewed by the EEOC until the state remedy has been invoked and at least 60 days have passed, "unless such proceedings have been earlier terminated." 42 U.S.C. § 2000e-5(c). And, when the EEOC does begin its investigation, it is required to "accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law." *Id.* § 2000e-5(b). "It is clear from this scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination." *New York Gaslight Club*, 447 U.S. at 65.

When courts assume jurisdiction over claims that have not been presented to the EEOC, they override

Congress's carefully constructed system of cooperative federalism. The statutory mandate that a litigant pursue state proceedings before the EEOC may investigate her claim is ineffectual if the litigant is permitted to leapfrog the EEOC review process and anything that comes before it. And directing the EEOC to "accord substantial weight" to state findings does no good if the EEOC is cut out of the process.

In short, because the federal policies embodied in Title VII cannot be achieved unless employment discrimination claims are presented to the EEOC, Congress must have intended for the exhaustion requirement to be jurisdictional. *See Webb* v. *Bd. of Educ. of Dyer Cty.*, 471 U.S. 234, 248 (1985) (Brennan, J., concurring in part and dissenting in part) ("Where Congress requires resort to administrative remedies as a predicate to invoking judicial remedies, the administrative remedies obviously are integral 'to enforce[ment of] a provision' of the civil rights laws."). Only a jurisdictional rule can ensure that exhaustion occurs in every case, regardless of whether the litigants prefer to avoid the EEOC entirely. *See Kremer*, 456 U.S. at 474 (quoting legislative history suggesting Congress's belief that defendants would prefer judicial resolution of discrimination claims); *Waffle House*, 534 U.S. at 297-298 (recognizing that individual litigants might enter contracts that seek to reduce the EEOC's role).

C. *Zipes* Does Not Support A Contrary Conclusion.

Despite the ample evidence that Title VII's statutory scheme bars jurisdiction over claims that have not been presented to the EEOC in the first instance,

several courts of appeals—including the Fifth Circuit below—have concluded that *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), dictates that the EEOC's exhaustion requirement is non-jurisdictional. Those courts are incorrect. *Zipes* addressed the jurisdictional status of Title VII's timeliness requirement, not its exhaustion requirement, and the *Zipes* Court deemed the timeliness requirement non-jurisdictional for reasons that have no application to the statute's exhaustion provision. Furthermore, this Court has often deemed statutory timing requirements non-jurisdictional while treating associated exhaustion requirements as jurisdictional, in light of the very different legal backdrops, purposes, and equitable implications of the two types of requirements.

1. *Zipes* concerned a class action complaint brought by female stewardesses who lost their jobs when they became mothers. *Id.* at 388. Although the plaintiff class had filed an EEOC charge before bringing suit, the statutory time limit for filing that charge had already lapsed for many of the women because they had been terminated long before the claim was presented to the EEOC. *Id.* at 388-389 & n.2; *see* 42 U.S.C. § 2000e-5(e)(1). The court of appeals excluded those individuals from the class, reasoning that their claims were "jurisdictionally barred" by their failure to "file[] charges of discrimination with the EEOC within 90 days of the alleged unlawful employment practice." 455 U.S. at 390. The question presented to this Court was "whether the *timely* filing of an EEOC charge is a jurisdictional prerequisite to bringing a Title VII suit." *Id.* at 392 (emphasis added).

The Court answered that question in the negative: "[C]ompliance with the filing period," it held, is "not a jurisdictional prerequisite to filing a Title VII suit." *Id.* at 398. The Court explained that "[t]he provision specifying the time for filing charges with the EEOC"—42 U.S.C. § 2000e-5(e)—"appears as an entirely separate provision" from the statute's jurisdictional grant. 455 U.S. at 393-394. It also explained that several statements in the legislative history referred to the timeliness provision as "a statute of limitations," which is typically deemed non-jurisdictional. *Id.* And the Court's prior cases had repeatedly "referred to the provision as a limitations statute" and treated it as such. *Id.* at 395-396 (citing *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 771 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975)). For all these reasons, the Court viewed the timeliness requirement as non-jurisdictional.

But all of those reasons are germane solely to the statute's timeliness requirement. They have no application to the distinct question of whether jurisdiction is barred where an employee has not filed a claim with the EEOC *at all*. The exhaustion requirement is established through different statutory text; it bears no resemblance to a statute of limitations; and it has repeatedly been interpreted as jurisdictional. *See infra* pp. 42, 48-49. Thus, while the Court has sometimes loosely referred to *Zipes* as holding that "Title VII's EEOC filing requirement was nonjurisdictional," *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 169 n.8 (2010); *Union Pac. R.R. Co.* v. *Bhd. of Locomotive Eng'rs*, 558 U.S. 67, 83 (2009), there is no question that the case's holding is confined to the "*timely* filing" requirement. *Zipes*, 455 U.S. at 393 (emphasis added).

Indeed, the *Zipes* Court could not have issued a holding with respect to the jurisdictional nature of the exhaustion requirement because the "plaintiff class filed its charge with the EEOC" before initiating suit. *In re Consol. Pretrial Proceedings*, 582 F.2d 1142, 1147 (7th Cir. 1978). The only question was whether that charge came too late for some of the class members. *Id.* at 1147-48. Accordingly, this Court's more recent precedents have correctly referred to *Zipes* as a case about the jurisdictional nature of a time bar. *See, e.g.*, *Green* v. *Brennan*, 136 S. Ct. 1769, 1778 (2016) (describing *Zipes* as concerning "the Title VII limitations period"); *Wong*, 135 S. Ct. at 1633 n.4 (characterizing *Zipes* as "concluding that a time limit did not speak in jurisdictional terms" (internal quotation marks omitted)).

2. Nor is there any other reason to assume that the non-jurisdictional nature of Title VII's timeliness requirement necessarily extends to the statute's exhaustion requirement. This Court has often held that the time limits for administrative review specified in a statute are non-jurisdictional, while also holding that the failure to present a claim to the agency *at all* is fatal to a court's jurisdiction. For example, this Court has held that the NLRA bars jurisdiction over certain claims and objections that have not been presented to the National Labor Relations Board. *Marquez*, 525 U.S. at 49-50; *Woelke*, 456 U.S. at 665. But the *Zipes* Court itself explained that the "time requirement for filing an unfair labor practice charge under the National Labor Relations Act operates as a statute of limitations subject to recognized equitable doctrines and not as a restriction of the jurisdiction of the National Labor Relations Board." 455 U.S. at 395 n.11. This

example is particularly significant because—as *Zipes* explained—"the National Labor Relations Act was the model for Title VII's remedial provisions." *Id.* (internal quotation marks omitted); *see also* 42 U.S.C. § 2000e-9 (explicitly incorporating NLRA provisions into Title VII).

Other statutes follow the same pattern, featuring a non-jurisdictional time limit and a jurisdictional exhaustion requirement. Thus, in *Salfi*, the Court held that the statutory time limit for filing a civil action under the Social Security Act is "a statute of limitations," and "[a]s such, * * * waivable by the parties." 422 U.S. at 763-764. Yet the Court simultaneously held that the statutory requirement to present a claim to the administrative body is a "jurisdictional prerequisite." *Id.* at 764, 766. Likewise, in *Kwai Fun Wong*, the Court determined that the time requirements for administrative and judicial review in the Federal Tort Claims Act are non-jurisdictional, 135 S. Ct. at 1638, without disturbing its earlier decision affirming the jurisdictional dismissal of an FTCA claim that had not been presented to the agency at all, *McNeil*, 508 U.S. at 108, 113. Nor was this a mere oversight: *McNeil*'s treatment of the exhaustion requirement as jurisdictional was discussed by the parties in their briefing and referenced at oral argument. *See* Tr. of Oral Argument at 27-29, *McNeil*, 508 U.S. 106 (No. 92-6033), 1993 WL 751850; U.S. Br. at 15-16, *McNeil*, 508 U.S. 106 (No. 92-6033), 1993 WL 347205. Yet the Court never hinted that its decision in *Wong* had any effect on *McNeil*.

3. This widespread distinction between the treatment of statutory time limits and exhaustion re-

quirements reflects a fundamental difference in the Court's interpretive approach to the two types of provisions: The Court has long applied a "rebuttable presumption" that Congress intends to make timeliness requirements non-jurisdictional, *Wong*, 135 S. Ct. at 1631, while simultaneously holding that exhaustion is a jurisdictional prerequisite so long as Congress has made that intent "fairly discernible," *Elgin*, 567 U.S. at 10-12. That makes sense because the two different types of requirements implicate different common-law backdrops, serve different purposes, and have different equitable implications.

To begin, statutory time limits and exhaustion provisions are enacted against very different legal backdrops. The principle that statutory time limits are subject to equitable tolling and therefore *non*-jurisdictional is "a long-established feature of American jurisprudence derived from 'the old chancery rule.'" *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 10-11 (2014). Based on this common-law rule, courts presume that Congress intended equitable tolling to apply so long as it is "consistent with the statute." *Id.* at 11; *see Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) (Congress "legislate[s] against a background of common-law adjudicatory principles").

The opposite is true with respect to exhaustion. In 1945, the Court was already able to point to a "long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Levers* v. *Anderson*, 326 U.S. 219, 222 (1945) (internal quotation marks omitted). And the Court's practice has long been to construe

statutory exhaustion requirements strictly, "refusing to add unwritten limits onto their rigorous textual requirements" and "rejecting every attempt to deviate *** from [their] textual mandate[s]." *Ross* v. *Blake*, 136 S. Ct. 1850, 1857 (2016).

In other words, while courts have historically used their equitable discretion to create exceptions to statutorily mandated time limits, they have long "refus[ed]" to exercise the same authority with respect to statutory exhaustion mandates. Given that backdrop, it is reasonable to assume that Congress expects its statutory deadlines to be enforced flexibly, while expecting its exhaustion requirements to be enforced as jurisdictional prerequisites.

Further, statutory time limits and statutory exhaustion requirements generally serve very different purposes. Statutory time limits typically "protect defendants against stale or unduly delayed claims." In doing so, they advance "a defendant's case specific interest," not "broader system-related goal[s]." *John R. Sand*, 552 U.S. at 133. When a requirement advances a defendant's interests, it is reasonable to assume that Congress intended to place the onus on the defendant to assert that requirement as an affirmative defense. *Id.*

By contrast, exhaustion requirements typically vindicate multiple systemic goals, from allowing "courts [to] benefit" from an agency's "experience and expertise," *Salfi*, 422 U.S. at 765, to decreasing the "burden on the judicial system" by resolving claims before they reach the courts, *McNeil*, 508 U.S. at 112. Congress does not generally leave the vindication of these system-related goals to the discretion of a defendant; instead, it makes provisions that serve

these purposes "jurisdictional." *John R. Sand*, 552 U.S. at 134.

The equitable implications of designating a timing requirement jurisdictional are also very different from the implications of attaching the same designation to a statutory exhaustion requirement. This Court has often found that time limits are non-jurisdictional in part because of the inequities that would flow if those limits were strictly enforced. *See, e.g.*, *Wong*, 135 S. Ct. at 1631. When time limits are deemed jurisdictional, a litigant with a worthy claim will find herself barred from relief merely because she missed a statutory deadline, even where that error was the result of excusable procedural confusion or justifiable ignorance. *See id.* at 1629-30. But the same concerns are not in play with respect to an exhaustion requirement. If a suit is dismissed on jurisdictional grounds because a litigant failed to present her claim to the administrative body, the litigant may still be able to exhaust that claim and return to court if the statutory deadline has not passed or if she can present a good case for equitable tolling of that deadline. In light of these differing equitable consequences, it makes sense to presume that statutory time limits are intended to be flexible, while statutory exhaustion requirements are not.

The considerations that generally prompt this Court to treat timeliness and exhaustion requirements differently apply with full force with respect to Title VII. While the history indicates that Congress viewed the timeliness requirement as a flexible statute of limitations, *Zipes*, 455 U.S. at 393-394, it suggests that Congress viewed EEOC review as an indispensable component of the statutory scheme.

See supra pp. 28-31. And while Title VII's timeliness requirement is primarily intended to protect defendants from "stale" claims, *Zipes*, 455 U.S. at 394 (quoting 110 Cong. Rec. 7243 (1964) (statement of Sen. Case)), the exhaustion requirement serves numerous system-related purposes. *See supra* pp. 27-32.

Finally, precisely because Title VII's timeliness requirement is non-jurisdictional, deeming the exhaustion requirement jurisdictional will not create inequities. A litigant who mistakenly presents an unexhausted Title VII claim to the court will have that claim dismissed, but she will be able to present the claim to the EEOC and return to court once it is exhausted if the filing period has not run or if equity justifies tolling that period. Indeed, recognizing the jurisdictional nature of Title VII's exhaustion requirement will help plaintiffs in many cases because courts have a duty to analyze jurisdictional issues on their own initiative at the outset of a case. That duty increases the likelihood that an unexhausted Title VII claim will be dismissed promptly, before the EEOC filing period has expired.

II. EVEN UNDER A CLEAR-STATEMENT ANALYSIS, TITLE VII'S EXHAUSTION REQUIREMENT IS JURISDICTIONAL.

Because Title VII's text, structure, and purpose make it "fairly discernible" that Congress intended to strip courts of jurisdiction of claims that have not been presented to the EEOC, Title VII's exhaustion requirement is rightly deemed jurisdictional. Outside of the exhaustion context, however, this Court has sometimes applied a clear-statement rule to determine whether a statutory mandate qualifies as

a jurisdictional prerequisite. *E.g.*, *Sebelius*, 568 U.S. at 153. This Court has never applied that framework when assessing whether an "integrated scheme of administrative and judicial review" strips a court of jurisdiction over unexhausted claims. *Elgin*, 567 U.S. at 13 (quoting *Fausto*, 484 U.S. at 445). But even if the "clear statement" analysis applies, Title VII's exhaustion requirement is plainly jurisdictional.

In deciding whether Congress has made a "clear statement" that a statutory requirement is jurisdictional, this Court does not require Congress to "incant magic words." *Sebelius*, 568 U.S. at 153. Instead, the Court typically performs a holistic analysis that looks to the text and structure of the relevant statute, *see Reed Elsevier*, 559 U.S. at 168; the "goal[s]" the requirement serves, *John R. Sand*, 552 U.S. at 133; and the broader "context" of this Court's precedent, *Sebelius*, 568 U.S. at 153-154 (quoting *Reed Elsevier*, 559 U.S. at 168). That contextual inquiry includes an examination of whether the Court has previously deemed the *particular* provision in question jurisdictional, *John R. Sand*, 552 U.S. at 134-136, and whether the Court's "interpretation of *similar* provisions in many years past" renders it "the type of limitation * * * that is properly ranked as jurisdictional absent an express designation," *Reed Elsevier*, 559 U.S. at 168 (emphasis added). Each of these considerations dictates that Title VII's exhaustion requirement is jurisdictional.

1. The "text and structure" of Title VII make plain Congress's intent to impose a jurisdictional bar on claims that have not been presented to the EEOC. Most critically, as explained above, the statute's

detailed, comprehensive, and integrated scheme for review leaves no room for courts to "allow [petitioners] to evade" the administrative processes. *Thunder Basin*, 510 U.S. at 216; *see supra* pp. 23-27. Title VII also includes several other textual and structural clues that reinforce the jurisdictional nature of the exhaustion requirement.

Section 2000e-5(f)(1) articulates Title VII's exhaustion requirement. Distilled to its essentials, that section provides:

> If a charge filed with the Commission * * * is dismissed * * * or if within one hundred and eighty days from the filing of such charge * * * the Commission has not filed a civil action * * * a civil action may be brought against the respondent named in the charge * * * by the person claiming to be aggrieved * * * .

42 U.S.C. § 2000e-5(f)(1). This language is "similar to other" exhaustion requirements "that this Court has deemed jurisdictional." *Patchak* v. *Zinke*, 138 S. Ct. 897, 905 (2018) (plurality opinion). For example, in *Mathews*, the exhaustion requirement that the Court found jurisdictional stated that "'[a]ny individual, after any final decision of the Secretary made after a hearing to which he was a party * * * may obtain a review of such decision by a civil action.'" 424 U.S. at 328.

Moreover, Section 2000e-5(f)(1) is "house[d]" in the same section as the statute's "jurisdictional grant," and is "link[ed]" to the provision vesting jurisdiction in federal courts. *Wong*, 135 S. Ct. at 1633; *see also Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 439 (2011) (holding a statutory requirement non-jurisdictional in part because it did not appear

in the provision captioned "Jurisdiction; finality of decisions"). Title VII's exhaustion requirement appears in Section 2000e-5(f), a section that the *Zipes* Court described—in its entirety—as "[t]he provision granting district courts jurisdiction under Title VII." 455 U.S. at 393. That is likely because all three components of Section 2000e-5(f) work together to establish jurisdiction over Title VII claims: Section 2000e-5(f)(1) sets out the circumstances in which the Commission or the Attorney General "*may bring* a civil action," and the conditions under which a "civil *action may be brought* against the respondent named in the charge" by "the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(f)(1) (emphases added). Section 2000e-5(f)(2), in turn, specifies that the Commission or the Attorney General "*may bring* an action for appropriate temporary or preliminary relief pending final disposition of such charge." *Id.* § 2000e-5(f)(2) (emphasis added). And Section 2000e-5(f)(3) dictates that courts "shall have jurisdiction of *actions brought* under this subchapter." *Id.* § 2000e-5(f)(3) (emphasis added). Read as a whole, Section 2000e-5(f) thus grants courts "jurisdiction" only over those actions that are "brought" following an EEOC "charge."

The provisions of Section 2000e-5 that spell out the particular remedial powers of the courts with respect to Title VII claims reinforce this conclusion. Those provisions rely on the premise that a charge has been filed with the agency. Echoing the statutory language governing administrative review, Section 2000e-5(g) empowers a court to "enjoin the respondent" (not the "defendant") and to award back pay "from a date [no] more than two years prior to the filing of a charge with the Commission." *Id.* § 2000e-

5(g)(1). As a consequence, a court cannot award these forms of relief without "work[ing] a kind of linguistic havoc" on the statute. *United States* v. *Brockamp*, 519 U.S. 347, 352 (1997). Indeed, all of the provisions governing judicial review repeatedly refer to the "charge" and the "respondent," demonstrating that Congress did not envision any judicial review where there was merely a "complaint" and a "defendant." *See* 42 U.S.C. § 2000e(5)(f)(1), (f)(2), (g)(1).

The absence of any statutory exceptions to the exhaustion requirement reinforces that conclusion. The text does not provide for judicial review of any employment discrimination claim that has not passed through the administrative scheme. In *Reed Elsevier*, this Court held that the "most significant[ ]" reason registration with the Copyright Office cannot be understood as a jurisdictional prerequisite to an infringement claim is that the statute "expressly *allows* courts to adjudicate infringement claims involving unregistered works in three circumstances." 559 U.S. at 165 (emphasis in original). Where Congress itself has permitted exceptions, it strongly suggests that courts may allow additional equitable exceptions such as waiver. *Id.* But the reverse is also true: Where Congress creates a scheme—particularly an administrative review scheme—that brooks no exceptions, it is unlikely that Congress intended to permit courts to excuse compliance with the statutory requirement for any reason. *See Patchak*, 138 S. Ct. at 906 (plurality opinion) (when Congress "completely prohibits" hearing actions of a particular type, the restriction tends to be jurisdictional).

Permitting jurisdiction over claims that have not been presented to the agency would also create a structural anomaly with respect to the scope of the EEOC's power. This Court has held that "the existence of a charge that meets the requirements set forth in [42 U.S.C. § 2000e-5(b)] is a jurisdictional prerequisite to judicial enforcement of a subpoena issued by the EEOC." *Shell Oil*, 466 U.S. at 65. Because Congress has withheld jurisdiction from courts to enforce the Commission's *investigative* activities in the absence of a charge, it would be illogical to conclude that Congress intended to afford *full judicial relief* to private parties in the same circumstance. That is particularly so because Congress intended the EEOC "to bear the primary burden of litigation," *Waffle House*, 534 U.S. at 286 (quoting *Gen. Tel. Co.*, 446 U.S. at 326), and mandated that an EEOC investigation must *precede* the filing of a private Title VII complaint, *see* 42 U.S.C. § 2000e-5(b), (f)(1).

2. The purpose of the Title VII exhaustion requirement also makes clear that it is jurisdictional. This Court has explained that jurisdictional requirements typically "seek not so much to protect a defendant's case-specific interest[s] * * * as to achieve broader system-related goal[s], such as facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency." *John R. Sand*, 552 U.S. at 133 (citations omitted). Title VII's exhaustion requirement advances *all three* of those system-related goals.

First, requiring employees to present their claims to the EEOC plainly "facilitat[es] the administration

of claims," *id.*, by giving the Commission and state agencies the opportunity to investigate claims, assemble a factual record, and bring their expertise to bear on employment disputes. *See Gen. Tel. Co.*, 446 U.S. at 326; *Waffle House*, 534 U.S. at 286-288.

Second, the exhaustion requirement "limit[s] the scope of a governmental waiver of sovereign immunity." *John R. Sand*, 552 U.S. at 133. Section 2000e-5(f) serves this goal directly by ensuring that state sovereign immunity is abrogated for a claim brought against a state employer only if the State has had an opportunity to resolve the claim outside of court first. *See Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 729-730 (2003) (recognizing that Title VII abrogates state sovereign immunity); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 243 (1985) (abrogation of state sovereign immunity must be expressed "in unmistakable language"). And Section 2000e-5(f) also indirectly prevents the Federal Government from enduring a waiver of its sovereign immunity that is broader than Congress intended: Section 2000e-16 governs Title VII claims against the Federal Government, and it explicitly incorporates the exhaustion requirement of Section 2000e-5(f). *See* 42 U.S.C. § 2000e-16(d).[7]

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[7] In *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court suggested that the timeliness requirement in Section 2000e-5 and the timeliness requirement in Section 2000e-16 should both be deemed non-jurisdictional because permitting "equitable tolling" would "amount[] to little, if any, broadening of the congressional waiver" of sovereign immunity. 498 U.S. at 95. The opposite is true for the exhaustion requirement: Whereas permitting equitable tolling merely affects the timing of a suit, requiring a plaintiff to follow the administrative

Third, Title VII's exhaustion requirement "promot[es] judicial efficiency," *John R. Sand*, 552 U.S. at 133, by facilitating the voluntary resolution of claims, mandating efforts at informal conciliation, and—if a suit is necessary—giving the expert agency an opportunity to take the lead in bringing any litigation. *See* 42 U.S.C. § 2000e-5(b), (f)(1); *Mach Mining*, 135 S. Ct. at 1651 (explaining that the agency's "duty * * * to attempt conciliation of a discrimination charge prior to filing a lawsuit" is "a key component of the statutory scheme"); *see also McNeil*, 508 U.S. at 112 (explaining that requiring a claimant to present an issue to an agency decreases the "burden on the judicial system," particularly where the scheme "govern[s] the processing of a vast multitude of claims").

In light of the fact that Title VII advances these system-related goals, Congress would hardly have intended for courts to characterize Title VII's exhaustion requirement as non-jurisdictional. That would enable a private defendant to vitiate these systemic protections by failing, whether by design or by accident, to enforce the exhaustion requirement.

3. The context provided by this Court's precedents—both as to Title VII in particular and as to exhaustion requirements more generally—reinforces the conclusion that Title VII's exhaustion requirement is jurisdictional.

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process may eliminate the need for litigation against the sovereign altogether. *Irwin* therefore suggests that the exhaustion requirement should be treated as jurisdictional to avoid significantly broadening the congressional waiver of sovereign immunity.

As to Title VII in particular: Shortly after the statute's enactment, this Court twice held that the filing of "charges of employment discrimination with the Commission" is one of "the jurisdictional prerequisites to a federal action." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973); *see Alexander*, 415 U.S. at 47 (same). In the years since, the Court has refined those blunt statements: In *Zipes*, the Court clarified that the Act's "*timely* filing" requirement is not jurisdictional. 455 U.S. at 392-393 (emphasis added). And in two other cases, *Albemarle Paper* and *Franks*, the Court clarified that "backpay may be awarded on a class basis * * * without exhaustion of administrative procedures by the unnamed class members." *Albemarle Paper*, 422 U.S. at 414 n.8; *see also Franks*, 424 U.S. at 771.

Each of these later decisions was based on considerations that are irrelevant to the question of whether an individual plaintiff must present her claim to the EEOC. *Zipes*' reasoning was confined to the statute's timely filing requirement, *see supra* pp. 33-34, and the Court's statements in *Albemarle Paper* and *Franks* were limited to the unique setting of class actions. *See Albermale Paper*, 422 U.S. at 414 n.8; *Franks*, 424 U.S. at 771. In particular, the *Albemarle Paper* Court reasoned that requiring each member of a plaintiff class to individually exhaust her claims in order to receive backpay would effectively eliminate the availability of class relief in the Title VII context, a result the Court thought contrary to the broad terms of Title VII's back pay provision, 42 U.S.C. § 2000e-5(g), and to legislative history indicating that Congress had specifically rejected an attempt to limit class relief. 422 U.S. at 414 n.8; *see*

also Franks, 424 U.S. at 771 (relying on this reasoning in *Albemarle Paper*).

Importantly, neither *Zipes* nor *Albemarle Paper* nor *Franks* ever suggested that a court may exercise jurisdiction over a claim that *no* party has presented in a charge to the EEOC. And the Court's precedent since then has confirmed the jurisdictional nature of the exhaustion requirement: In *Waffle House*, the Court explained that Title VII grants the EEOC "*exclusive* jurisdiction over [a] claim for 180 days," 534 U.S. at 288 (emphasis added). That statement would be false if courts have jurisdiction to hear Title VII clams whenever they are brought.

Most recently, in *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500 (2006), the Court held that Title VII's employee numerosity requirement is not jurisdictional. But the analysis that led the Court to that conclusion points in the opposite direction with respect to the exhaustion requirement. Notably, the Court held that the numerosity requirement was non-jurisdictional because (1) "[n]othing in the text of Title VII indicates that Congress" wants courts to be able to raise numerosity "on their own motion"; (2) numerosity is properly regarded as an "element" of the claim that should be left to a jury to decide; and (3) it would be inequitable to force courts to dismiss claims that do not meet the numerosity requirement. *Id.* at 514. But with respect to the exhaustion requirement, (1) the entire framework of Title VII indicates that Congress intended courts to raise exhaustion "on their own motion," *see supra* pp. 41-45; (2) exhaustion is in no way an element of the claim; and (3) because Title VII's time limits are subject to equitable tolling, a jurisdictional dismissal

does not have the severe equitable consequences it did in *Arbaugh*, *see supra* pp. 39-40.

Moreover, the *Arbaugh* Court recognized that even when all three of these considerations counsel in favor of finding one of Title VII's requirements non-jurisdictional, that requirement may still be deemed jurisdictional if the statute contains evidence that Congress intended to make it "an ingredient of subject matter jurisdiction." 546 U.S. at 514. The Court found no such evidence in *Arbaugh* in large part because the numerosity requirement is located "in a separate provision" from Title VII's jurisdictional grant, and because the numerosity requirement "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 515 (quoting *Zipes*, 455 U.S. at 394). Once more, the opposite is true for Title VII's exhaustion requirement. That requirement is in the same section as the jurisdictional grant and is textually linked to it. *See supra* pp. 42-43.

The import of this precedent concerning Title VII in particular is amplified by the Court's precedent regarding the jurisdictional nature of exhaustion requirements in general. In *Reed Elsevier*, the Court held that a requirement will be deemed jurisdictional where the "Court's interpretation of similar provisions" shows that the requirement is of a "type * * * that is properly ranked as jurisdictional absent an express designation." 559 U.S. at 168. The *Reed Elsevier* Court further explained that in *Bowles* v. *Russell*, 551 U.S. 205 (2007), the Court had deemed an appellate filing deadline jurisdictional because it "was of a type [the Court] had long held *did* speak in jurisdictional terms even absent a jurisdictional

label" and because "nothing about [the provision's] text or context, or the historical treatment of that type of limitation, justified a departure from this view." 559 U.S. at 168 (internal quotation marks omitted).

The same is true with respect to Title VII's exhaustion provision. As the numerous cases cited in Part I demonstrate, this Court has long treated exhaustion provisions "as jurisdictional absent an express designation." *Id.* For example, none of the provisions of the CSRA that created the "jurisdictional rule" in *Elgin* were expressly styled as jurisdictional prerequisites. *See* 5 U.S.C. §§ 7701, 7703, 7513. Likewise, the *Thunder Basin* Court recognized that it had to decide whether the administrative procedures at stake in that case were the exclusive route to federal court jurisdiction because the Mine Act was "facially silent" as to whether pre-enforcement challenges were within the jurisdiction of federal district courts. 510 U.S. at 208.

The Court has also repeatedly held that statutory mandates are jurisdictional where they require a litigant to present an issue to the agency in the first instance, even when the mandate is not expressed in jurisdictional terms. *See, e.g.*, *McNeil*, 508 U.S. at 111 (affirming jurisdictional dismissal where the FTCA prohibited a claimant from "institut[ing]" a suit before he had "first presented the claim to the appropriate Federal agency" (internal quotation marks omitted)). Most notably, in *Woelke*, the Court held that courts lack jurisdiction to review objections that have not been pressed before the NLRB, even though the statute states only that "no objection that has not been urged before the Board * * * shall be

considered" by a court, and even though the provision contains an explicit exception for "extraordinary circumstances." 456 U.S. at 665; *see Reed Elsevier*, 559 U.S. at 165 (observing that the presence of exceptions tends to suggest a requirement is non-jurisdictional).

The paucity of cases deeming *statutory* exhaustion requirements non-jurisdictional is similarly telling. Of course, judicially imposed exhaustion requirements are never jurisdictional, which sometimes creates the impression that exhaustion requirements in general must be similarly flexible. In fact, the reverse is true: While "judge-made exhaustion doctrines, even if flatly stated at first, remain amenable to judge-made exceptions[,] * * * statutory exhaustion provision[s] stand[] on a different footing." *Ross*, 136 S. Ct. at 1857 (citation omitted).

Thus, when the *Reed Elsevier* Court cited examples of non-jurisdictional statutory exhaustion requirements, it identified only two cases, both of which concerned the Prison Litigation Reform Act. *See* 559 U.S. at 166 n.6. That Act, however, provides a rare example of a statute in which Congress has expressly disclaimed the jurisdictional nature of the exhaustion requirement by specifying that non-jurisdictional defenses may be decided before exhaustion. *See Woodford*, 548 U.S. at 101 (citing 42 U.S.C. § 1997e(c)(2)). And even as to that statute, the Court has repeatedly held that the PLRA's exhaustion requirement is sufficiently absolute that it "foreclose[es] judicial discretion" to recognize exceptions. *Ross*, 136 S. Ct. at 1857.

In the absence of an explicit statutory indication like that found in the PLRA, the Court has consist-

ently refused to treat statutory exhaustion requirements as non-jurisdictional. Indeed, in *Hallstrom* v. *Tillamook Cty.*, 493 U.S. 20 (1989), the Court confronted a statutory provision that required a litigant to give a federal agency, a State, and an alleged violator 60 days' notice before filing suit regarding certain environmental violations. The statute did not set out any detailed administrative process in connection with the notice requirement, and it contained an express exception permitting litigants to forgo notice with respect to suits raising certain violations. *See* 42 U.S.C. § 6972(b). Nonetheless, the *Hallstrom* Court declined to hold that the requirement was non-jurisdictional or that the notice requirement could be satisfied after the suit had been filed. 493 U.S. at 32-33. Instead, the Court held that the notice requirement was, at a minimum, a "mandatory condition[ ] precedent to * * * suit," *id.* at 31, which was not subject to "equitable modification," *id.* at 27. It therefore held that failure to comply with the notice provision "require[d] dismissal of [an] action" even "after years of litigation and a determination on the merits." *Id.* at 32; *see Reed Elsevier*, 559 U.S. at 171 (characterizing the provision at stake in *Hallstrom* as a "mandatory precondition to suit that * * * district courts may or should enforce *sua sponte*").

Hallstrom reveals this Court's extreme reticence to permit courts to excuse litigants from complying with statutory provisions mandating that a claim be brought before a federal agency in the first instance. Title VII's exhaustion requirement is much more robust than that in *Hallstrom*, and it is directly analogous to the numerous statutory exhaustion requirements this Court has found jurisdictional in

the past. For these reasons, and because the text, structure, and precedent all point in the same direction, there can be no real doubt that Title VII "clearly states" a congressional intent to make exhaustion a jurisdictional prerequisite to suit.

III. THE DISTRICT COURT PROPERLY DISMISSED RESPONDENT'S RELIGIOUS DISCRIMINATION CLAIM FOR LACK OF JURISDICTION.

Because Title VII's exhaustion requirement is jurisdictional under any standard, Davis's unexhausted religious discrimination claim must be dismissed. Title VII requires that a charge of discrimination be "in writing under oath or affirmation," "contain such information and be in such form as the Commission requires," and provide sufficient detail to allow the Commission both to notify the employer of the "date, place and circumstances of the alleged unlawful employment practice" and to "make an investigation." 42 U.S.C. § 2000e-5(b).

The charge Davis filed with the Texas Workforce Commission and the EEOC fulfilled each of these requirements with respect to her allegations of sexual harassment and retaliation. Using the TWC's charge form, Davis submitted a notarized charge presenting these two claims to the TWC and the EEOC. J.A. 80. "Retaliation" and "sex" are marked as the bases for the discrimination in the appropriate section of the charge. *Id.* The charge also describes several specific instances of sexual harassment and retaliation, including the dates and locations of those incidents. And, in the "Discrimination Statement," the charge asserts that respondent was "discriminated against *** because of [her] gender/sex, female,

and in retaliation for [her] complaint of harassment." *Id.*

The TWC sent Davis a letter through her attorney specifically acknowledging that it had investigated her allegations of "Sex" discrimination and "Retaliation." J.A. 92-95. Both the TWC and the Department of Justice sent Davis "Right to Sue" letters referencing the charge. J.A. 97-98, 105-106. Accordingly, the district court had jurisdiction over Davis's sexual harassment and retaliation claims.

The opposite is true with respect to the religious discrimination claim that Davis raised for the first time in her complaint before the district court. *See* Pet. App. 29a-35a. That claim was not asserted in Davis's charge. The charge form provides a box to indicate that "religion" is a basis for the asserted discrimination. That box is unchecked. J.A. 80. The charge does not describe the "date, place and circumstances" of any alleged religious discrimination, 42 U.S.C. § 2000e-5(b), and there is no allegation of religious discrimination in the charge's "Discrimination Statement." J.A. 80. The TWC's letter describing its investigation similarly makes no mention of any alleged religious discrimination. J.A. 92-95.

Indeed, the only recorded reference to religious discrimination before Davis raised the allegation in her district court complaint comes in an edit that Davis made to her EEOC "intake questionnaire." That edit involved handwriting the word "religion" onto the second page of the form without any additional details. *See* J.A. 71, 90. Because that single word could not possibly give the EEOC sufficient information to "make an investigation" of the alleged religious discrimination or to "notify" Fort

Bend County of the "date, place, and circumstances of the alleged unlawful employment practice," 42 U.S.C. § 2000e-5(b), the edit would have been insufficient even if it had appeared on Davis's notarized charge form. And it did not.

Permitting the courts to assume jurisdiction over this religious discrimination claim would therefore run roughshod over Congress's carefully constructed scheme of administrative and judicial review. Because Davis did not present her claim to the EEOC, it could not "make an investigation" of the alleged religious discrimination or attempt to resolve it "by informal methods of conference, conciliation, and persuasion." *Id.* And because the EEOC was not informed of Davis's allegation of religious discrimination, the EEOC received no notice that it should monitor future complaints against Fort Bend County to ensure that the County is not engaged in a "pattern or practice" of religious discrimination. Finally, because Davis brought this claim directly to the court, the sovereign County lost an important opportunity to address the allegation before becoming embroiled in costly litigation. This is not the scheme Congress envisioned.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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ADDENDUM

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STATUTORY PROVISIONS INVOLVED

1. **Section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, provides in pertinent part:**

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * *

2. **Section 706 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, provides:**

Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency,

labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon

which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has

initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall

take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission,

or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to

such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court--

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of Title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of Title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

3. **Section 707 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6, provides:**

Civil actions by the Attorney General

(a) Complaint

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) Jurisdiction; three-judge district court for cases of general public importance: hearing,

determination, expedition of action, review by Supreme Court; single judge district court: hearing, determination, expedition of action

The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending

immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Transfer of functions, etc., to Commission; effective date; prerequisite to transfer; execution of functions by Commission

Effective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of Title 5, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Transfer of functions, etc., not to affect suits commenced pursuant to this section prior to date of transfer

Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Investigation and action by Commission pursuant to filing of charge of discrimination; procedure

Subsequent to March 24, 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title.

4. **Section 709 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8, provides:**

Investigations

(a) Examination and copying of evidence related to unlawful employment practices

In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of

any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

(b) Cooperation with State and local agencies administering State fair employment practices laws; participation in and contribution to research and other projects; utilization of services; payment in advance or reimbursement; agreements and rescission of agreements

The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines

that the agreement no longer serves the interest of effective enforcement of this subchapter.

(c) Execution, retention, and preservation of records; reports to Commission; training program records; appropriate relief from regulation or order for undue hardship; procedure for exemption; judicial action to compel compliance

Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order

issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

(d) Consultation and coordination between Commission and interested State and Federal agencies in prescribing recordkeeping and reporting requirements; availability of information furnished pursuant to recordkeeping and reporting requirements; conditions on availability

In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any

State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) Prohibited disclosures; penalties

It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

5. **Section 710 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-9, provides:**

Conduct of hearings and investigations pursuant to section 161 of Title 29

For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of Title 29 shall apply.

6. **Section 717 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, provides:**

Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Publishing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and

regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall--

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be

notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to--

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a), or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any

succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

(f) Section 2000e-5(e)(3) of this title applicable to compensation discrimination

Section 2000e-5(e)(3) of this title shall apply to complaints of discrimination in compensation under this section.